ATTORNEY FOR APPELLANT:

**BRUCE W. GRAHAM**
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**JODI KATHRYN STEIN**
Deputy Attorney General
Indianapolis, Indiana



# IN THE
# COURT OF APPEALS OF INDIANA

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| CHARLES DAVID HUNTER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A02-0710-CR-901 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0612-FB-00062

**May 16, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Charles David Hunter appeals the sentence that was imposed following his guilty plea to Conspiracy to Commit Robbery,[1] a class B felony. Specifically, Hunter contends that the trial court abused its discretion in sentencing him when it overlooked several mitigating factors that were apparent from the record and identified several aggravating factors not supported by the record to impose an enhanced sentence. Hunter also argues that the sentence is inappropriate in light of the nature of the offense and his character. Finding that the sentence is inappropriate, we remand this cause to the trial court with instructions that it revise the sentence to the advisory term of ten years of incarceration with two years suspended to community corrections.

## FACTS

On December 13, 2006, Hunter, Antwoine Love, Michael Mitchell, and two juveniles agreed to rob the Igloo Frozen Custard restaurant in Tippecanoe County. Love and one of the juveniles entered the restaurant and left. Shortly thereafter, they reentered the restaurant, posed as customers, ordered food, and sat in the back of the restaurant. Hunter, who was armed with a handgun, Mitchell, and the other juvenile then entered the restaurant. After ordering the customers and employees to the ground, the group took personal property and money from the customers and cashiers. One employee was struck in the head and another employee was kicked in the head during the robbery. Moreover, at some point during the episode, the handgun was discharged.

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[1] Ind. Code § 35-42-5-1(2); Ind. Code § 35-41-5-2.

During the course of the investigation of the robbery, one of the employees identified Love as a participant. When Love was interviewed by the police, he provided details of the robbery and implicated Hunter as the gunman. One of the juveniles was also interviewed and also identified Hunter as the gunman.

As a result of the incident, the State charged Hunter with one count of class B felony conspiracy to commit robbery, five counts of class B felony robbery, six counts of class D felony theft, one count of class D felony conspiracy to commit theft, and seven counts of class B felony criminal confinement. Thereafter, Hunter pleaded guilty to an amended charge of conspiracy to commit robbery, a class B felony, and robbery, a class B felony. The plea agreement left sentencing to the trial court's discretion.

At the sentencing hearing, the trial court found that the aggravators outweighed the mitigators and "merged" the two convictions,[2] sentencing Hunter to twenty years, with eighteen years executed, and two years through the Tippecanoe County Community Corrections. Hunter now appeals.

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[2] There appeared to be some disagreement at the guilty plea hearing as to whether Hunter could be convicted of this charge and a separate count of robbery as charged in count II because of double jeopardy concerns. However, at the sentencing hearing, the prosecutor commented, "we were disagreeing whether or not Conspiracy would merge with the actual robbery, and it would. So therefore, the max would be twenty . . . years. I had to clarify that." Tr. p. 31. Additionally, the trial court observed that "the charges here, the two charges here are the same incident under the law of Indiana, it merges. I'm gonna merge the Conspiracy into the Robbery and I'll sentence him to the Department of Corrections for twenty years with a recommendation the last two be at Community Corrections." Id. at 35. The trial court's sentencing order further states that the robbery count was to be merged with the conspiracy count. Appellant's App. p. 7.

## DISCUSSION AND DECISION

### I. Abuse of Discretion

Hunter first claims that his sentence must be set aside because the trial court abused its discretion in failing to identify certain mitigating circumstances that were apparent from the record. Additionally, Hunter contends that the trial court erroneously identified several aggravating factors in support of an enhanced sentence.

We initially observe that sentencing decisions are within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). So long as the sentence imposed is within the statutory range, the trial court's sentencing determination will be reversed only for an abuse of discretion. Id. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id. A trial court may be found to have abused its discretion in the following ways: (1) by failing to enter a sentencing statement; (2) by entering a sentencing statement that includes reasons not supported by the record; (3) by entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) by entering a sentencing statement that includes reasons that are improper as a matter of law. Id. at 491.

### A. Mitigating Factors

Hunter claims that his sentence must be set aside because the trial court abused its discretion in failing to identify his regular attendance at school, written correspondence that was submitted to the trial court indicating that the commission of the offense was "out of

character" for Hunter, and the fact that he pleaded guilty as mitigating factors. As a result, Hunter claims that he was entitled to a reduced sentence.

We note that it is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). Generally, when a defendant proffers a mitigating circumstance, the sentencing court is not obligated to explain why it chose not to make a finding of mitigation. Tunstill v. State, 568 N.E.2d 539, 546 (Ind. 1991). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer, 868 N.E.2d at 493. In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked that factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

Contrary to Hunter's claim, the trial court in fact identified Hunter's guilty plea, his low LSI-R[3] score, and his family support as mitigating circumstances, as well as his age and lack of criminal history. Tr. p. 20, 33. As for Hunter's claim that the trial court overlooked his school attendance, respectable grades and his "out of character" behavior as mitigating, appellant's br. p. 9-10, he has failed to satisfy his burden of showing that these factors should

[3] This Level of Service Inventory test was administered to Hunter on July 26, 2007. This examination covered areas including criminal history, family, alcohol and drug usage, and emotional issues. Appellant's App. p. 6. Hunter's score revealed that he fell into the "low/moderate risk/needs" category. Id.

have been afforded any significant weight. More particularly, the record shows that Hunter attended eleventh grade in Texas during the 2005-06 school year and that he returned to Indiana in September 2006 to complete high school. Appellant's App. p. 11-12, 35-36. Although Hunter earned good grades while in Texas, there is nothing in the record to indicate that he was enrolled in school or earning good grades in Indiana at the time of these offenses. As for the allegation that his actions were "out of character," the letters that various individuals wrote and submitted to the trial court on Hunter's behalf establish that Hunter exercised better judgment while living with his family in Texas. Id. at 34-39. In essence, the record is devoid of any evidence that Hunter continued to exercise good judgment after returning to Indiana. Rather, it is apparent that he began to associate with individuals of poor character. As a result, Hunter has failed to establish a connection between his previous good conduct and how it relates to the instant offenses. Thus, we conclude that the trial court did not abuse its discretion in refusing to identify these factors as mitigating.

B. Aggravating Circumstances

Hunter next claims that the trial court identified several improper aggravating factors. More specifically, Hunter contends that the trial court improperly identified his lack of truthfulness, the discharge of the handgun, and the victim's recommendation for an enhanced sentence as aggravating factors.

We note that the State's charging information specifically alleged that Hunter possessed a handgun and discharged it during the robbery. At both the guilty plea and

sentencing hearings, Hunter denied that allegation and asserted that an individual who was not even involved in the robbery was the actual gunman. Tr. p. 12-13, 21-23.

At the sentencing hearing, despite the investigating detective's testimony establishing that Hunter was the gunman, Hunter again changed his version of the events and testified that he was only in possession of a "plastic gun" that was "not capable of being fired." Id. at 23. Under these circumstances, we find that Hunter's unwillingness to be completely truthful to the court while testifying under oath as to his participation in the robbery was properly identified as an aggravating circumstance. See Sipple v. State, 788 N.E.2d 473, 481-82 (Ind. Ct. App. 2003) (holding that the defendant's decision to provide an inaccurate account of the events leading up to the shooting in the guilty plea context was relevant to the assessment of his character).

Hunter further claims that the trial court erred in concluding that the firing of the handgun constituted an aggravating factor because it was an element of the charged offense. Although Hunter correctly posits that the trial court may not use a material element of an offense as an aggravating circumstance, the trial court may properly identify a particularized circumstance of the criminal act as an aggravating factor. Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002). As set forth above, Hunter pleaded guilty to class B felony conspiracy to commit robbery. Hunter's action in discharging the weapon is neither an element of the offense nor a part of the crime of which Hunter was convicted. Thus, the trial court could properly determine that firing the weapon was an aggravating factor.

Finally, Hunter claims that the trial court improperly construed the following letter from one of the victims as a specific request for an aggravated or enhanced sentence:

> Having no idea which person was involved with which part of the crime, it is my belief they should all receive harsh punishment for their immaturity and ignorance. Those waived as juveniles should even get some "adult punishment." All five should have to apologize to every victim for the loss and suffering they have been through, as well as pay for all damages and losses accrued in the event. Should this be any of their first criminal incidents, maybe they should receive a lesser punishment, because I know how it can be for a child to "act out."

Appellant's App. p. 10 (emphasis added).

At the outset, we note that pursuant to Indiana Code section 35-38-1-7.1(c), a trial court is not limited by the specific factors enumerated in the other subsections of that statute with regard to the finding of aggravating circumstances. Unlike the previous versions of Indiana Code section 35-38-1-7.1 that required a trial court to merely "consider" "any oral or written statement made by victim of the crime," in deciding what sentence to impose, the current version of the statute contains no such reference or limitation. Thus, it is not error for the trial court to consider a crime victim's recommendation of a sentence as an aggravating factor.

We note that it is typically unlikely that the victim of a serious crime would recommend a lenient sentence for the commission of the offense. That said, however, the victim's letter quoted above suggests that the juveniles involved in the offense might deserve a reduced sentence. As discussed below, Hunter's only previous contact with the adult criminal justice system was a conviction for the relatively minor offense of driving without a license. Appellant's App. p. 3. As a result, the trial court may very well have erred in

concluding that the victim's letter constituted an aggravating factor. Even so, we cannot say that the trial court abused its discretion in sentencing Hunter in light of the remaining aggravating circumstances that were properly identified. See Burks v. State, 838 N.E.2d 510, 525 (Ind. Ct. App. 2005) (holding that even though the trial court erroneously identifies a factor to support an enhanced sentence, a single proper aggravating factor can support a sentence enhancement).

## II. Inappropriate Sentence

Although we have concluded that Hunter's sentence should not be set aside under the abuse of discretion analysis, Hunter also claims that his sentence is inappropriate in light of the nature of the offense and his character. More specifically, Hunter argues that "the plethora of mitigating evidence" warrants a ten-year advisory sentence[4] with a portion of that sentence suspended. Appellant's Br. p. 16.

Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." We defer to the trial court during appropriateness review, Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and we refrain from merely substituting our judgment for that of the trial court. The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). However, we also

[4] In accordance with Indiana Code section 35-50-2-5, "a person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

note that maximum sentences should generally be reserved for the worst class of offenses and offenders. Pagan v. State, 809 N.E.2d 915, 926 (Ind. Ct. App. 2004).

Regarding the nature of the offenses, our review of the record reveals that there are no circumstances in this case that would warrant an enhanced sentence for conspiracy to commit robbery as a class B felony as charged. As for Hunter's character, the record shows that he was eighteen years old when he committed the offenses. His prior offenses, which consist of operating a vehicle while never receiving a license and false informing as a juvenile, were relatively minor and nonviolent. Appellant's App. p. 3. Additionally, Hunter pleaded guilty and was willing to make restitution. Hunter has the support of his family, and he tested in the low "needs" range on the LSI-R test. Id. at 6.

Although the State maintains that the sentence was appropriate because the potential maximum sentence was two hundred and eighty-one years had he been convicted of all charged offenses, it is highly unlikely that Hunter could have been lawfully convicted and sentenced on all counts. See Lundberg v. State, 728 N.E.2d 852, 855 (Ind. 2000) (vacating the defendant's conviction for conspiracy to commit murder on double jeopardy grounds when it was "reasonably possible that the jury relied upon the same evidence to establish the essential elements of murder and the overt act of the conspiracy charge"); Polk v. State, 783 N.E.2d 1253, 1259 (Ind. Ct. App. 2003) (vacating the defendant's conviction for confinement when it was established that "there existed a reasonable possibility that the robbery and confinement convictions were supported by the same evidence of the same transgression"); Wethington v. State, 655 N.E.2d 91, 97 (Ind. Ct. App. 1995) (observing that "if the property

underlying a robbery charge is the same as that underlying a theft charge, the theft becomes a lesser included offense of the robbery, and conviction for both counts violates double jeopardy provisions").

Hunter received the maximum sentence on the conviction for conspiracy to commit robbery. When considering the nature of the offense and Hunter's character, we cannot agree that the twenty-year sentence with eighteen years executed and placement in community corrections for two years is appropriate. See Bacher v. State, 686 N.E.2d 791, 802 (Ind.1997) (observing that maximum sentences should generally be reserved for the worst offenses and offenders). As a result, we revise Hunter's sentence to the advisory term of ten years of incarceration with two years suspended to community corrections.

The judgment of the trial court is reversed and remanded with instructions.

ROBB, J., concurs.

HOFFMAN, Sr.J, dissents with opinion.

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| CHARLES DAVID HUNTER, | ) | |
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**HOFFMAN, Senior Judge, dissenting.**

The majority concludes that the trial judge did not abuse his discretion when sentencing Hunter. The majority holds that the trial court properly evaluated and considered the mitigating evidence. In fact, the only aggravating circumstance used by the trial court that was found to be questionable was the court's interpretation of one of the victims' recommendations. However, because of the existence of other valid aggravating circumstances used by the trial court, there is no abuse of discretion. Consequently, the majority concludes that under the abuse of discretion review, there is no reason to set aside the sentence. I agree.

The majority, however, decides, under Ind. Appellate Rule 7(B) analysis, that Hunter's sentence is inappropriate in light of the nature of the offense and the character of the

offender. The majority cites to cases that hold that maximum sentences should generally be reserved for the worst class of offenses and offenders. Slip op. at 10.

Regarding the nature of the offense, Hunter and others met and agreed to rob the restaurant. Hunter entered the restaurant after some accomplices had entered the restaurant to find out how long it was open and to look around. Hunter and the others robbed the customers, taking personal property and money, in addition to taking money from the business itself. Hunter discharged the handgun during the robbery which elevated the risk of injury or death to the victims and increased their emotional trauma. As it was, one employee was struck in the head and another employee was kicked in the head during the commission of the robbery. There were multiple victims of the robbery. As a result of Hunter's actions, the State charged him with thirteen Class B felonies and seven Class D felonies. Hunter's potential maximum sentence exposure was two hundred and eighty-one years.

Furthermore, the trial judge was concerned with the proportionality of Hunter's sentence. The trial court had already sentenced Hunter's co-conspirators, and Hunter was the gunman. As a consequence of Hunter's larger role in the offenses committed, the trial court properly concluded that Hunter deserved a greater sentence for the offenses, with respect to the nature of the offense review.

Regarding the character of the offender, it is true that Hunter had a minimal prior criminal history. That history consisted of a false informing informal adjustment as a juvenile, and a Class C misdemeanor operating a vehicle while never receiving a license conviction. However, when questioned about the present offenses, Hunter gave differing

stories, each minimizing his level of involvement, in particular, his possession and firing of the handgun used in the robbery.

Our supreme court has upheld the maximum sentence for an offense where the offender had no prior criminal record and where the defendant had failed to give a fully truthful account of the crime. *See Brown v. State*, 667 N.E.2d 1115, 1116 (Ind. 1996). In contrast, a panel of this court found that revision of a sentence was necessary where the defendant had no criminal history and was initially deceptive with police, the victim's family, or emergency personnel. *Long v. State*, 865 N.E.2d 1031, 1038 (Ind. Ct. App. 2007). However, that defendant ultimately pled guilty as charged without a plea agreement, admitted that he needed help with anger control, and remained in jail while his case was pending. During the guilty plea hearing, the defendant accepted responsibility for his crime. *Id*. at 1034. Therefore, while it is true that the maximum sentence should be reserved for the worst offenses and offenders, that determination is a subjective one. The trial court is able to observe the demeanor and sincerity of the defendant. As the majority states, we defer to the trial court during the appropriateness review. *See Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007).

Here, Hunter was never fully truthful with the trial court about his involvement in the charged offenses, even after being confronted with evidence establishing that he had been identified as the gunman. He continued to resist accepting responsibility after the trial judge openly questioned Hunter's truthfulness. Out of deference to the trial court's unique perspective during sentencing, I would not set aside Hunter's sentence.

For those reasons, I dissent.